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CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1942

No. 151

FIRST TRUST & DEPOSIT COMPANY and EDITH G. BALLARD, as Executors of the Last will and Testament of WILLIAM M. BALLARD, Deceased,

Petitioners,

vs.

FRANK J. SHAUGHNESSY, Collector of Internal Revenue of the United States, for the 21st District of New York,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI, UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

The contention of the petitioners that there is a conflict between the Second and Third Circuits is borne out by the argument of the respondent at pages 9 and 10 of the respondent's brief.

In *Denniston* v. *Commissioner*, 106 F. 2d 925 (C. C. A. 3d), the Circuit Court of Appeals said at page 927:

> "There was as the Board points out substantial evidence to support the findings that the decedent was motivated by the desire to avoid estate taxes and we must accept it."

Nevertheless, the Circuit Court of Appeals in the Denniston case held that the presumption in favor of the Commissioner's ruling that the gift was made in contemplation of death was overcome by evidence:

1—That there was a motive other than the desire to escape estate taxes, namely, to carry out a long established policy of dividing her estate equally among her children.

2—That she was a vigorous, robust woman with better than average health for one of her age.

3—That she was planning her activities for the future without any fear of failing health or impending death.

Evidence of the second and third grounds for the Circuit Court of Appeals' decision in the Denniston case is present in the case at bar. This is not questioned by the respondent.

Evidence of the first ground mentioned in the Denniston case is also present in the case at bar. Mr. Ballard changed a gift which he had made in 1929 under which enjoyment by the donee was postponed until his death to a form of gift under which the donee could enjoy the gift immediately.

The only argument which respondent can advance for distinction between the Denniston case and the case at bar is that the Circuit Court of Appeals has found in the case at bar that Mr. Ballard expected the proceeds of the life insurance policies to be enjoyed by his family after his

death. However, in the Denniston case, the donor by the terms of the trust agreement reserved for herself the life use of the property and her children could not have any beneficial use of the property until after the donor's death.

The Denniston case cannot be distinguished from the present case. They are in conflict.

To state the argument of the respondent's brief in a word, it is that evidence of desire to save estate taxes is conclusive evidence of contemplation of death in absence of proof of what respondent calls a "life motive" even though the evidence establishes that there is in the donor's mind "an absence of any consciousness that death is near" (respondent's brief, page 9), his doctors had pronounced him in good health and he had the same life expectancy as any other man of his age and he was in active business and optimistically planning for the future along his usual normal lines (R. 206, 245).

This, in our opinion, means that the government is contending that the evidence of desire to save estate taxes is conclusive evidence that a transfer made with such a desire is made in contemplation of death. The government expressly makes this contention when the subject matter of the gifts is insurance policies. (See bottom page 10 of respondent's brief.)

The decision of the Court below is to the same effect. Indeed, it goes even further. The Circuit Court of Appeals has held that a gift made with a desire to save estate taxes is ipso facto and as a matter of law made in contemplation of death when either (a) there is no affirmative proof from the taxpayer that the donee expected to exercise her legal rights to use the property given, or (b) the donee could not

legally use the property given during the donor's life (Record 246, 247). If such be the form and motive of the gift then the gift, the Court below holds, is as a matter of law made in contemplation of death and the donor's condition of health and his state of mind toward his death have nothing whatever to do with the case.

Such decision seems to us in conflict with the decision of the Third Circuit in the Denniston case and contrary to the decision of this Court, in *U. S.* v. *Wells*, 283 U. S. 102, and *Colorado Bank* v. *Commissioner*, 305 U. S. 23.

In the latter case the gift was by means of a trust agreement under which the donee could not legally use any of the property until after the donor's death. The gift was made because the donor wished to be sure that his children would at his death have at least the property which he placed in the trust. This Court stated:

> "The mere purpose to make provision for children after a donor's death is not enough conclusively to establish that action to that end was 'in contemplation of death.' Broadly speaking, thoughtful men habitually act with regard to ultimate death but something more than this is required in order to show that a conveyance comes within the ambit of the statute."

This Court reversed the Circuit Court which held that such a gift made in such form and with such motive was conclusively made in contemplation of death and sustained the order of the Board of Tax Appeals which had held on all the facts including the donor's condition of health and his state of mind toward his death the gift was not made in contemplation of death.

If a gift which would be non-taxable under the Colorado Bank case becomes as a matter of law taxable where there is proof of a desire to save estate taxes; if the proper rule of law is that stated by the Circuit Court of Appeals, Second Circuit, in this case rather than that stated by the Third Circuit in the Denniston case; if it is the law that a desire to save estate taxes is equivalent to contemplation of death and the condition of the donor's health and his state of mind toward his death are immaterial, then the Supreme Court should so state the law and not leave citizens and their lawyers, revenue agents and the Courts below in doubt concerning the correct rules of law.

The government cites the cases of *Farmer Loan & Trust Co.* v. *Bowers*, 98 F. 2d 794; *Oliver* v. *Bell*, 103 F. 2d 760; *Commonwealth Trust Co. of Pittsburgh* v. *Driscoll;* C. C. H. Federal Inheritance, Estate and Gift Tax Service, pars. 10,011, 10,016 (W. D. Pa.), affirmed per curiam, July 9, 1943, on District Court's opinion (C. C. A. 3rd) (not yet reported); *Liebmann* v. *Hassett* (Mass.), decided June 22, 1943 (1943 Prentice-Hall, par. 62,739).

The citation of these cases merely emphasizes the necessity of granting the present petition so that this Court may pass upon the question of what is the tax effect of a transfer made because of a desire to save estate taxes. In the case of *Moline Properties, Inc.* v. *Commissioner* decided by this Court on June 1, 1943, this Court granted certiorari "because of the volume of similar legislation in the lower Courts and because of alleged conflict of the decision below with other circuit court decisions." In the case at bar the decision below is in conflict with other circuit court decisions. There is a vast volume of similar litigation in the lower Courts. See, for example, *Turner* v. *Hassett*, 37, F.,

Supplement 996; *Estate of Robert Wetherill* v. *Commissioner*, 36 B. T. A. 1259; *Estate of John B. Waterman* v. *Commissioner*, memorandum opinion by B. T. A. entered December 12, 1941, reported in C. C. H. Board of Tax Appeals, Decision No. 12,220-D.

It is respectfully submitted that becasue the question here presented is arising and will continue to arise in innumerable cases and involves a principle concerning the collection of internal revenue of far reaching importance, and because of the conflict between different Circuit Courts of Appeals this Court should grant the petition so that it may pass upon and finally settle the question of what weight and effect should be given to the fact that a donor desired by a particular transfer to reduce estate taxes in deciding whether the transfer was made in contemplation of death.

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